

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

SHEEX, INC.,

Plaintiff,

v.

BEDGEAR, LLC,

Defendant.

C.A. No. 14-1380-LPS-CJB

JURY TRIAL DEMANDED

**SHEEX, INC.’S ANSWER, DEFENSE, AND COUNTERCLAIMS TO DEFENDANT
BEDGEAR’S COUNTERCLAIMS**

Plaintiff and Counterclaim-Defendant, SHEEX[®], Inc. (“SHEEX”) answers the Counterclaims of Defendant and Counterclaim-Plaintiff, Bedgear, LLC (“Bedgear”) as follows. The paragraphs are numbered to correspond to the numbered paragraphs of Bedgear’s Counterclaims against SHEEX (“Counterclaims”). Except as expressly admitted below, SHEEX denies the allegations and characterizations in Bedgear’s Counterclaims.

ANSWER TO COUNTERCLAIMS

48. Pursuant to Rule 7 of the Federal Rules of Civil Procedure, SHEEX provides the following answers to Bedgear’s Counterclaims against SHEEX.

ANSWER TO NATURE OF THE ACTION

49. SHEEX admits that Bedgear’s Counterclaims purport to bring claims under 35 U.S.C. §§1, et seq., 15 U.S.C. §§1051, et seq., and Delaware statutory and common law, but SHEEX expressly denies the veracity of them all and denies any liability thereunder.

ANSWER TO THE PARTIES

50. Upon information and belief, SHEEX admits the allegations of Paragraph 50 of Bedgear's Counterclaims.

51. SHEEX admits the allegations of Paragraph 51 of Bedgear's Counterclaims.

ANSWER TO JURISDICTION AND VENUE

52. SHEEX admits that Bedgear's Declaratory Judgment Counterclaims, Counts I-IV, purport to bring claims under 35 U.S.C. §§1, et seq. and Title 28 U.S.C. §§2201 and 2202, but SHEEX expressly denies the veracity of them all. SHEEX admits that Bedgear's Declaratory Judgment Counterclaims, Counts I-IV, purport to bring claims over which this Court has subject matter jurisdiction under 28 U.S.C. §§1331, 1338(a), 2201, and 2202.

53. SHEEX admits that Bedgear's Trademark Infringement Counterclaims, Counts V-VIII, purport to bring claims under 15 U.S.C. §§1051-1127, but SHEEX denies that there is a basis for such claims. SHEEX admits that Bedgear's Trademark Infringement Counterclaims, Counts V-VIII, purport to bring claims over which this Court has subject matter jurisdiction under 28 U.S.C. §§1331 and 1338(a) and 15 U.S.C. §§1121 and 1126.

54. SHEEX admits that Bedgear's Trademark Infringement Counterclaims, Counts IX-XII, purport to bring claims under Delaware common and statutory law, but SHEEX denies that there is a basis for such claims. SHEEX admits that Bedgear's Trademark Infringement Counterclaims, Counts IX-XII, purport to bring claims over which this Court has subject matter jurisdiction under 28 U.S.C. §1338(b) and 28 U.S.C. §1367.

55. SHEEX admits the allegations of Paragraph 55 for the purposes of this litigation only.

56. SHEEX admits that it is subject to personal jurisdiction in this District for the purposes of this litigation only. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 56 of Bedgear's Counterclaims.

57. SHEEX admits that it maintains a website on the Internet through which it sells its patented, next-generation solutions to create the best sleep environment possible through breathable, stretchable, moisture-wicking technical fabric. SHEEX admits that it has sold its patented, next-generation solutions to customers throughout the United States. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 57 of Bedgear's Counterclaims.

58. SHEEX admits venue is proper in this District for the purposes of this litigation only. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 58 of Bedgear's Counterclaims.

ANSWER TO DECLARATORY JUDGMENT COUNTERCLAIMS

59. SHEEX admits the allegations of Paragraph 59 of Bedgear's Counterclaims.

60. SHEEX admits the allegations of Paragraph 60 of Bedgear's Counterclaims.

ANSWER TO COUNT ONE

(Declaratory Judgment of Non-Infringement of the '580 patent)

61. SHEEX hereby incorporates by reference its responses to Paragraphs 48-60 as if fully restated in this Paragraph.

62. SHEEX admits that an actual and justiciable case or controversy exists between SHEEX and Bedgear with respect to U.S. Patent No. 8,402,580 (the "'580 patent"). SHEEX admits that it has brought an action against Bedgear for infringing the '580 patent by making, using, importing, offering for sale, and/or selling one or more of Bedgear's "Dri-Tec

Performance Sheets” and equivalent products. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 62 of Bedgear’s Counterclaims.

63. SHEEX denies the allegations of Paragraph 63 of Bedgear’s Counterclaims.

64. SHEEX denies the allegations of Paragraph 64 of Bedgear’s Counterclaims.

ANSWER TO COUNT TWO

(Declaratory Judgment of Invalidity of the ’580 patent)

65. SHEEX hereby incorporates by reference its responses to Paragraphs 48-64 as if fully restated in this Paragraph.

66. SHEEX admits that an actual and justiciable case or controversy exists between SHEEX and Bedgear with respect to the ’580 patent. SHEEX admits that it has brought an action against Bedgear for infringing the ’580 patent by making, using, importing, offering for sale, and/or selling one or more of Bedgear’s “Dri-Tec Performance Sheets” and equivalent products. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 66 of Bedgear’s Counterclaims.

67. SHEEX denies the allegations of Paragraph 67 of Bedgear’s Counterclaims.

68. SHEEX denies the allegations of Paragraph 68 of Bedgear’s Counterclaims.

ANSWER TO COUNT THREE

(Declaratory Judgment of Non-Infringement of the ’982 patent)

69. SHEEX hereby incorporates by reference its responses to Paragraphs 48-68 as if fully restated in this Paragraph.

70. SHEEX admits that an actual and justiciable case or controversy exists between SHEEX and Bedgear with respect to U.S. Patent No. 8,566,982 (the “’982 patent”). SHEEX admits that it has brought an action against Bedgear for infringing the ’982 patent by making, using, importing, offering for sale, and/or selling one or more of Bedgear’s “Dri-Tec

Performance Sheets” and equivalent products. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 70 of Bedgear’s Counterclaims.

71. SHEEX denies the allegations of Paragraph 71 of Bedgear’s Counterclaims.

72. SHEEX denies the allegations of Paragraph 72 of Bedgear’s Counterclaims.

ANSWER TO COUNT FOUR

(Declaratory Judgment of Invalidity of the ’982 patent)

73. SHEEX hereby incorporates by reference its responses to Paragraphs 48-72 as if fully restated in this Paragraph.

74. SHEEX admits that an actual and justiciable case or controversy exists between SHEEX and Bedgear with respect to the ’982 patent. SHEEX admits that it has brought an action against Bedgear for infringing the ’982 patent by making, using, importing, offering for sale, and/or selling one or more of Bedgear’s “Dri-Tec Performance Sheets” and equivalent products. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation in Paragraph 74 of Bedgear’s Counterclaims.

75. SHEEX denies the allegations of Paragraph 75 of Bedgear’s Counterclaims.

76. SHEEX denies the allegations of Paragraph 76 of Bedgear’s Counterclaims.

ANSWER TO TRADEMARK INFRINGEMENT COUNTERCLAIMS

77. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 77 of Bedgear’s Counterclaims, and therefore denies them.

78. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 78 of Bedgear’s Counterclaims, and therefore denies them.

79. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 79 of Bedgear's Counterclaims, and therefore denies them, and specifically denies that Bedgear implemented a unique approach to fabrics and manufacturing techniques.

80. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 80 of Bedgear's Counterclaims, and therefore denies them.

81. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 81 of Bedgear's Counterclaims, and therefore denies them, and specifically denies that Bedgear invented performance sleep.

82. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 82 of Bedgear's Counterclaims, and therefore denies them.

83. SHEEX denies that Bedgear adopted and has consistently used a family of PERFORMANCE marks and denies that Bedgear has used the term "performance" since at last as early as 2006.

84. SHEEX denies that Bedgear has any exclusive rights in the term "performance" and denies that Bedgear has established PERFORMANCE brands that are well-recognized. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of all other allegations contained in Paragraph 84 of Bedgear's Counterclaims, and therefore denies them.

85. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 85 of Bedgear's Counterclaims, and

therefore denies them, specifically that Bedgear has operated its website available at the URL: www.bedgear.com since as least as early as 2010.

86. SHEEX denies that Bedgear has any exclusive rights in the term “performance” and denies that Bedgear has established a family of PERFORMANCE marks. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of all other allegations contained in Paragraph 86 of Bedgear’s Counterclaims, and therefore denies them.

87. SHEEX denies that Bedgear owns more than 40 trademarks that are registered and subsisting in the United States Patent and Trademark Office (“USPTO”).

88. SHEEX admits that Paragraph 88 of Bedgear’s Counterclaims contains a chart of what purports to be marks that Bedgear registered at the USPTO. SHEEX denies that these are valid trademarks, and further denies that PERFORMANCE PILLOW was registered on 6/12/2012.

89. SHEEX admits that copies of what purport to be Certificates of Registration are attached to Bedgear’s Counterclaims as Exhibit A. SHEEX denies that these are valid trademarks.

90. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 90 of Bedgear’s Counterclaims, and therefore denies them. SHEEX specifically denies that Bedgear’s purported marks are valid trademarks, have been extensively and continuously used for the past nine years, and that the public associates these marks with Bedgear.

91. SHEEX denies that Bedgear’s purported marks and variants thereof have been uniquely associated with Bedgear’s products and services among consumers and, specifically

that these marks are valid trademarks and have developed substantial secondary meaning in the marketplace.

92. SHEEX denies that Bedgear's purported marks are valid trademarks. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of all other allegations contained in Paragraph 92 of Bedgear's Counterclaims, and therefore denies them.

93. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 93 of Bedgear's Counterclaims, and therefore denies them. SHEEX specifically denies that Bedgear's purported marks are valid trademarks, have acquired a strong secondary meaning in the minds of the purchasing public and business community, and are now highly distinctive and famous and serve uniquely to identify Bedgear's products and services.

94. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 94 of Bedgear's Counterclaims, and therefore denies them. SHEEX specifically denies that Bedgear's purported marks are valid trademarks, enjoy tremendous goodwill and have become assets of significant value as source indicators of Bedgear's products and services, and have also become famous among consumers.

95. SHEEX admits the allegations in Paragraph 95 of Bedgear's Counterclaims.

96. SHEEX denies the allegations contained in Paragraph 96 of Bedgear's Counterclaims.

97. SHEEX admits the allegations in Paragraph 97 of Bedgear's Counterclaims.

98. SHEEX denies the allegations contained in Paragraph 98 of Bedgear's Counterclaims.

99. SHEEX denies the allegations contained in Paragraph 99 of Bedgear's Counterclaims.

100. SHEEX denies the allegations contained in Paragraph 100 of Bedgear's Counterclaims.

101. SHEEX denies the allegations contained in Paragraph 101 of Bedgear's Counterclaims.

102. SHEEX admits the use of its mark SHEEX AIRE (U.S. Trademark Reg. No. 4,508,220) on its website, but otherwise denies the allegations contained in Paragraph 102 of Bedgear's Counterclaims.

103. SHEEX admits the allegations contained in Paragraph 103 of Bedgear's Counterclaims.

104. SHEEX is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 104 of Bedgear's Counterclaims, and therefore denies them.

105. SHEEX denies the allegations regarding their listed goods and services, but otherwise admits the allegations contained in Paragraph 105 of Bedgear's Counterclaims.

106. SHEEX denies the allegations contained in Paragraph 106 of Bedgear's Counterclaims.

107. SHEEX denies the allegations in Paragraph 107 of Bedgear's Counterclaims, specifically that authorization was necessary or required.

108. SHEEX denies the allegations contained in Paragraph 108 of Bedgear's Counterclaims.

109. SHEEX denies the allegations contained in Paragraph 109 of Bedgear's Counterclaims.

110. SHEEX admits that Bedgear has no control over the quality of SHEEX's goods or services. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation contained in Paragraph 110 of Bedgear's Counterclaims.

111. SHEEX denies the allegations contained in Paragraph 111 of Bedgear's Counterclaims.

112. The allegation of Paragraph 112 is not directed to SHEEX, and therefore no answer is required. To the extent a response is required, SHEEX admits that Bedgear purports to seek the intervention of the court, but denies the allegations contained in Paragraph 112 of Bedgear's Counterclaims.

COUNT FIVE

(Federal Trademark Infringement – 15 U.S.C. §1114(a))

113. SHEEX hereby incorporates by reference its responses to paragraphs 48-112 as if fully restated in this paragraph.

114. SHEEX denies the allegations contained in Paragraph 114 of Bedgear's Counterclaims.

115. SHEEX denies the allegations contained in Paragraph 115 of Bedgear's Counterclaims.

116. SHEEX denies the allegations contained in Paragraph 116 of Bedgear's Counterclaims.

COUNT SIX

(Federal Unfair Competition – 15 U.S.C. §1125(a))

117. SHEEX hereby incorporates by reference its responses to paragraphs 48-116 as if fully restated in this paragraph.

118. SHEEX denies the allegations contained in Paragraph 118 of Bedgear's Counterclaims.

119. SHEEX denies the allegations contained in Paragraph 119 of Bedgear's Counterclaims.

120. SHEEX admits that Bedgear has no control over the nature and quality of SHEEX's goods and services. Except as expressly admitted in this Paragraph, SHEEX denies each and every allegation contained in Paragraph 120 of Bedgear's Counterclaims.

121. SHEEX denies the allegations contained in Paragraph 121 of Bedgear's Counterclaims.

COUNT SEVEN

(Federal Unfair Competition – 15 U.S.C. §1125(a))

122. SHEEX hereby incorporates by reference its responses to paragraphs 48-121 as if fully restated in this paragraph.

123. SHEEX denies the allegations contained in Paragraph 123 of Bedgear's Counterclaims.

124. SHEEX denies the allegations contained in Paragraph 124 of Bedgear's Counterclaims.

125. SHEEX denies the allegations contained in Paragraph 125 of Bedgear's Counterclaims.

126. SHEEX denies the allegations contained in Paragraph 126 of Bedgear's Counterclaims.

COUNT EIGHT
(Federal Unfair Competition – 15 U.S.C. §1125(a))

127. SHEEX hereby incorporates by reference its responses to paragraphs 48-126 as if fully restated in this paragraph.

128. SHEEX denies the allegations contained in Paragraph 128 of Bedgear's Counterclaims.

129. SHEEX denies the allegations contained in Paragraph 129 of Bedgear's Counterclaims.

130. SHEEX denies the allegations contained in Paragraph 130 of Bedgear's Counterclaims.

COUNT NINE
(Trademark Infringement – Delaware Common Law)

131. SHEEX hereby incorporates by reference its responses to paragraphs 48-130 as if fully restated in this paragraph.

132. SHEEX denies the allegations contained in Paragraph 132 of Bedgear's Counterclaims.

133. SHEEX denies the allegations contained in Paragraph 133 of Bedgear's Counterclaims.

134. SHEEX denies the allegations contained in Paragraph 134 of Bedgear's Counterclaims.

COUNT TEN

(Unfair Competition – Delaware Common Law)

135. SHEEX hereby incorporates by reference its responses to paragraphs 48-134 as if fully restated in this paragraph.

136. SHEEX denies the allegations contained in Paragraph 136 of Bedgear's Counterclaims.

137. SHEEX denies the allegations contained in Paragraph 137 of Bedgear's Counterclaims.

138. SHEEX denies the allegations contained in Paragraph 138 of Bedgear's Counterclaims.

COUNT ELEVEN

(Injury to Business Reputation and Dilution – Delaware Statutory Law: 6 Del. C. §3313)

139. SHEEX hereby incorporates by reference its responses to paragraphs 48-138 as if fully restated in this paragraph.

140. SHEEX denies the allegations contained in Paragraph 140 of Bedgear's Counterclaims.

141. SHEEX denies the allegations contained in Paragraph 141 of Bedgear's Counterclaims.

142. SHEEX denies the allegations contained in Paragraph 142 of Bedgear's Counterclaims.

COUNT TWELVE

(Deceptive Trade Practices – Delaware Statutory Law: 6 Del. C. §2532)

143. SHEEX hereby incorporates by reference its responses to paragraphs 48-142 as if fully restated in this paragraph.

144. SHEEX denies the allegations contained in Paragraph 144 of Bedgear's Counterclaims.

145. SHEEX denies the allegations contained in Paragraph 145 of Bedgear's Counterclaims.

146. SHEEX denies the allegations contained in Paragraph 146 of Bedgear's Counterclaims.

147. SHEEX denies the allegations contained in Paragraph 147 of Bedgear's Counterclaims.

RESPONSE TO PRAYER FOR RELIEF

148. SHEEX denies that Bedgear is entitled to any relief requested or to any relief whatsoever.

DEFENSES

149. SHEEX denies each and every allegation contained in Bedgear's Counterclaims that was not specifically denied above. SHEEX also reserves all rights to allege defenses to Bedgear's Counterclaims that become known through the course of discovery.

First Defense – Non-Infringement

150. SHEEX does not engage and has not engaged in any acts that would constitute direct or indirect infringement of any valid or enforceable claims of Bedgear's purported trademarks, including PERFORMANCE PILLOW, PERFORMANCE PILLOW PROTECTOR, PERFORMANCE TOPPER, PERFORMANCE MATTRESS, PERFORMANCE MATTRESS PROTECTOR, PERFORMANCE MATTRESS PROTECTION, PERFORMANCE WOOL, PERFORMANCE SLEEP SHOP, PERFORMANCE BASE LAYER (collectively,

“PERFORMANCE Marks”), and PERFORMANCE BASE LAYER and BASE LAYER (collectively, “BASE Marks”), and AIR-X (“AIR Mark”).

Second Defense – Lack of Ownership

151. Bedgear’s PERFORMANCE Marks and BASE Marks are descriptive and lack secondary meaning.

Third Defense – No Likelihood of Confusion

152. There is no likelihood of confusion between Bedgear’s PERFORMANCE Marks, BASE Marks, and/or AIR Mark and SHEEX’s registered and/or common law trademarks.

Fourth Defense – Priority

153. SHEEX maintains a prior registration for a mark incorporating the term “performance” and priority constructive use, priority common law use, and/or priority use in commerce against Bedgear’s PERFORMANCE Marks and BASE Marks in each of SHEEX’s registered and/or common law trademarks at issue.

Fifth Defense – Priority Outside of Geographic Use

154. SHEEX maintains a prior registration for a mark incorporating the term “performance” and priority constructive use, priority common law use, and/or priority use in commerce against Bedgear’s PERFORMANCE Marks and BASE Marks in each of SHEEX’s registered and/or common law trademarks at issue beyond the geographic scope of any purported priority use of Bedgear’s PERFORMANCE Marks and BASE Marks.

Sixth Defense – Waiver, Acquiescence and/or Consent

155. Bedgear’s claims of trademark infringement of its asserted PERFORMANCE Marks, BASE Marks, and/or AIR Mark are barred, in whole or in part, by the doctrines of waiver, acquiescence and/or consent.

Seventh Defense – Unclean Hands

156. Bedgear's claims of trademark infringement of its asserted PERFORMANCE Marks, BASE Marks, and/or AIR Mark are barred, in whole or in part, by unclean hands.

Eighth Defense –Laches

157. Bedgear's claims of trademark infringement of its asserted PERFORMANCE Marks, BASE Marks, and/or AIR Mark are barred, in whole or in part, by laches.

COUNTERCLAIMS

158. Pursuant to Rule 13 of the Federal Rules of Civil Procedure, SHEEX asserts the following counterclaims against Bedgear. In addition to the counterclaim described below, Bedgear expressly reserves the right to allege additional counterclaims as they become known to Bedgear through the course of discovery.

NATURE OF THE ACTION

159. The following counterclaims seeks, *inter alia*, an order cancelling Bedgear's ill-gotten federal trademark registrations for all of its asserted PERFORMANCE Marks, as the term "PERFORMANCE" is a widely used and descriptive term in the bedding industry, and a judgment declaring that none of Bedgear's PERFORMANCE Marks, BASE Marks, and/or AIR Mark are infringed or diluted by SHEEX and that there is no unfair competition. Bedgear does not have priority use on the terms "PERFORMANCE," "BASE," or "AIR" in the bedding industry and has co-existed with SHEEX and others in the industry for approximately eight years.

THE PARTIES

160. Counterclaim-Defendant SHEEX is a company incorporated under the laws of the State of Delaware, with its principal place of business in Irmo, South Carolina.

161. On information and belief, Counterclaim-Plaintiff Bedgear is a limited liability company incorporated in Delaware, with its principal place of business at 110 BI-County Blvd., Suite 101, Farmingdale, New York.

JURISDICTION AND VENUE

162. Counterclaim Counts I and II arise under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202, 28 U.S.C. §1331, and 15 U.S.C. §§1119, 1121.

COUNT ONE

(Cancellation of Bedgear's PERFORMANCE Marks)

163. SHEEX hereby incorporates by reference its responses to paragraphs 48-162 as if fully restated in this paragraph.

164. Bedgear and/or its predecessors are the owners of the following purported registrations at the USPTO: Registration No. 4,301,890 for PERFORMANCE MATTRESS PROTECTION (issued 3/12/2013 in Class 24); Registration No. 4,310,501 for PERFORMANCE SLEEP SHOP (issued 3/26/2013 in Class 35); Registration No. 4,313,541 for PERFORMANCE PILLOW (issued 4/2/2013 in Class 20); Registration No. 4,313,540 for PERFORMANCE MATTRESS PROTECTOR (issued 4/2/2013 in Class 24); Registration No. 4,555,046 for PERFORMANCE PILLOW PROTECTOR (issued 6/24/2014 in Class 24); Registration No. 4,592,983 for PERFORMANCE WOOL (issued 8/26/2014 in Classes 20 and 24); and Registration No. 4,739,526 for PERFORMANCE MATTRESS (issued 5/19/2015 in Class 20). Guard Master Inc. is the listed owner of Registration No. 4,586,997 for PERFORMANCE TOPPER (issued 8/19/2014 in Class 20). Eugene Alletto, Bedgear's CEO, is the listed owner of Registration No. 4,615,949 for PERFORMANCE BASE LAYER (issued 10/7/2014 in Class 24). (These registrations are hereinafter collectively referred to as the "PERFORMANCE Marks.")

165. In each registration issued by the USPTO for Bedgear's PERFORMANCE Marks, Bedgear was required to disclaim all terms except "performance." Therefore, all of Bedgear's PERFORMANCE Marks are reduced to the principle term "performance."

166. Bedgear's use of "performance" as its principle term in its host of purported PERFORMANCE Marks is generic, or at best merely descriptive, and therefore not protectable inasmuch as the term "performance" describes the functionality of its goods and services.

167. Performance textiles provide functional qualities like fire and ballistic resistance, moisture management (or wicking), anti-microbial or anti-fungal qualities, thermal regulation, wind or water resistance, etc.

168. The USPTO has repeatedly found that "performance" is a descriptive term.

169. In 2007, the USPTO issued an Office Action to Hospitality Trading Corporation denying principal registration of "LUXURY PERFORMANCE TEXTILES" due to the descriptiveness of the term "performance." The Office Action stated in relevant part: *"Attached Internet evidence shows that the term 'PERFORMANCE,' when applied to textiles, has a specific meaning in the industry. Performance textiles are those made for various end-use applications that provide functional qualities like fire and ballistic resistance, moisture management (or wicking), anti-microbial or anti-fungal qualities, thermal regulation, wind or water resistance, etc. 'PERFORMANCE' is a term of art within the industry that has acquired a very specific, and very descriptive meaning. Thus, this term is unregistrable on the Principal Register for goods such as applicant's."*

170. In 2008 and 2009, the USPTO sent Office Actions to SHEEX requiring a disclaimer for "performance" because it determined that the term was descriptive and an

unregistrable part of the mark, noting that it was a “*merely descriptive of the composition of the goods.*”

171. The term “performance” has become diluted in the industry. Notably, there are 239 applications at the USPTO using the term “performance” in Classes 20 and 24 – and at least 100 of those were registered. Of the 100 “performance” marks that were registered, many were registered before Bedgear and less than 10% were registered to Bedgear.

172. Further, the registration of the PERFORMANCE Marks have spurred countless TTAB proceedings and Federal lawsuits.

173. Bedgear’s earliest registration of one of its PERFORMANCE Marks was issued on March 12, 2013, and is less than five years old. Therefore, none of Bedgear’s PERFORMANCE Marks have been declared incontestable.

174. Bedgear cannot demonstrate secondary meaning in any PERFORMANCE mark.

175. To the extent Bedgear ever owned valid trademark rights in its purported PERFORMANCE Marks, such rights have been abandoned due to uncontrolled widespread third-party use.

176. Given that the term “performance” is not a protectable trademark, Registration No. 4,301,890; Registration No. 4,310,501; Registration No. 4,313,541; Registration No. 4,313,540; Registration No. 4,555,046; Registration No. 4,592,983; and Registration No. 4,739,526; Registration No. 4,586,997 and Registration No. 4,615,949 should be cancelled pursuant to the Lanham Act, 15 U.S.C. §§1052(e), 1064(3), and 1119.

COUNT TWO

(Cancellation of Bedgear’s BASE LAYER Marks)

177. SHEEX hereby incorporates by reference its responses to paragraphs 48-176 as if fully restated in this paragraph.

178. Eugene Alletto, Bedgear's CEO, is the listed owner of Registration No. 4,615,948 for BASE LAYER (issued 10/7/2014 in Class 24) and Registration No. 4,615,949 for PERFORMANCE BASE LAYER (issued 10/7/2014 in Class 24). (These registrations are hereinafter collectively referred to as the "BASE LAYER Marks.")

179. Bedgear's use of "base layer" is generic, or at best merely descriptive, and therefore not protectable inasmuch as the term "base layer" describes functionality of its goods and services.

180. Pursuant to the dictionary, the term "*base*" means "the bottom support of anything; that on which a thing stands or rests" and "*layer*" is "a thickness of some material laid on or spread over a surface." Bedgear registered its BASE LAYER Marks for "mattress protectors and pillow protectors," goods that are the bottom layer of textiles that are spread over the surface of a bed or pillow.

181. Bedgear's earliest registration of one of its BASE LAYER Marks was issued on October 7, 2014, and is less than five years old. Therefore, none of Bedgear's BASE LAYER Marks have been declared incontestable.

182. Bedgear cannot demonstrate secondary meaning in its alleged BASE LAYER Mark.

183. Further, SHEEX has prior use of the term "FABRIC BASE" at common law, which it began using at least as early as February 2011, to identify the *layers* of its bedding goods. Bedgear's applications for the BASE LAYER Marks were not filed until June 2013, and they stated a first use date of January 2012 – both well after SHEEX's documented first use.

184. Given that the term “base layer” is not a protectable trademark, Registration No. 4,615,948 and Registration No. 4,615,949 should be cancelled pursuant to the Lanham Act, 15 U.S.C. §§1052(e), 1064(3), and 1119.

COUNT THREE
(Declaratory Judgment of Non-Infringement)

185. SHEEX hereby incorporates by reference its responses to paragraphs 48-184 as if fully restated in this paragraph.

186. SHEEX seeks a declaratory judgment that its past use and continued use of its SHEEX PERFORMANCE SHEETS, SHEEX PERFORMANCE BEDDING, SHEEX AIRE, SHEEX AIR, and PERFORMANCE FIBER FILL marks and its references to a “fabric base” or “layer” in describing how its products function is not intended or likely to cause confusion, mistake, or deception between the source, association, or affiliation of the Parties’ respective products, services or businesses, under the Lanham Act, Delaware Common Law, or Delaware Statutory Law.

187. SHEEX further seeks a declaratory judgment that its past use and continued use of its SHEEX PERFORMANCE SHEETS, SHEEX PERFORMANCE BEDDING, SHEEX AIRE, SHEEX AIR, and PERFORMANCE FIBER FILL marks and its references to a “fabric base” or “layer” in describing how its products function has not and does not jeopardize the goodwill, if any, symbolized by Bedgear’s currently registered trademarks, nor does it cause any other injury to Bedgear under the Lanham Act, Delaware Common Law, or Delaware Statutory Law.

COUNT FOUR

(Declaratory Judgment of No Unfair Competition)

188. SHEEX hereby incorporates by reference its responses to paragraphs 48-187 as if fully restated in this paragraph.

189. SHEEX seeks a declaratory judgment that its past use and continued use of its SHEEX PERFORMANCE SHEETS, SHEEX PERFORMANCE BEDDING, SHEEX AIRE, SHEEX AIR, and PERFORMANCE FIBER FILL marks and its references to a “fabric base” or “layer” in describing how its products function is not intended or likely to cause confusion, mistake, or deception between the source, association, or affiliation of the Parties’ respective products, services or businesses, and does not unfairly compete with Bedgear under the Lanham Act, Delaware Common Law, or Delaware Statutory Law, including but not limited to 6 Del. C. §§3313 and 2532.

190. SHEEX further seeks a declaratory judgment that its past use and continued use of its SHEEX PERFORMANCE SHEETS, SHEEX PERFORMANCE BEDDING, SHEEX AIRE, SHEEX AIR, and PERFORMANCE FIBER FILL marks and its references to a “fabric base” or “layer” in describing how its products function has not and does not cause any injury to Bedgear under the Lanham Act, Delaware Common Law, or Delaware Statutory Law, including but not limited to 6 Del. C. §§3313 and 2532.

COUNT FIVE

(Declaratory Judgment of No Trademark Dilution)

191. SHEEX hereby incorporates by reference its responses to paragraphs 48-190 as if fully restated in this paragraph.

192. SHEEX seeks a declaratory judgment that its past use and continued use of its SHEEX PERFORMANCE SHEETS, SHEEX PERFORMANCE BEDDING, SHEEX AIRE,

SHEEX AIR, and PERFORMANCE FIBER FILL marks and its references to a “fabric base” or “layer” in describing how its products function has not and will not cause actual dilution of Bedgear’s currently registered marks, under the Lanham Act, Delaware Common Law, or Delaware Statutory Law, including but not limited to 6 Del. C. §3313.

193. SHEEX further seeks a declaratory judgment that its past use and continued use of its SHEEX PERFORMANCE SHEETS, SHEEX PERFORMANCE BEDDING, SHEEX AIRE, SHEEX AIR, and PERFORMANCE FIBER FILL marks and its references to a “fabric base” or “layer” in describing how its products function has not and does not cause any other injury to Bedgear under the Lanham Act, Delaware Common Law, or Delaware Statutory Law, including but not limited to 6 Del. C. §3313.

COUNT SIX

(Declaratory Judgment on Equitable Grounds)

194. SHEEX hereby incorporates by reference its responses to paragraphs 48-193 as if fully restated in this paragraph.

195. Bedgear has been on constructive notice and fully aware of SHEEX’s use, promotion, and registration of its growing family of SHEEX marks and trade names, since at least as early as May 2008 – for more than 7 years.

196. Until the filing of these Counterclaims, Bedgear did not raise any issue with respect to SHEEX’s use, promotion and registration of its growing family of SHEEX marks and trade names, in any jurisdiction for more than 7 years.

197. SHEEX and Bedgear have co-existed without issue or confusion and SHEEX relied on Bedgear’s silence and inaction in using, promoting, and growing its family of SHEEX marks and trade names.

PRAYER FOR RELIEF

WHEREFORE, SHEEX requests the following relief with regard to its Answer to Bedgear's Counterclaims:

- A. That the Court enter judgment against Bedgear and dismiss with prejudice any and all of their counterclaims and order that they take nothing as a result of the counterclaims;
- B. That the Court enter judgment that Bedgear has infringed the '580 patent and the '982 patent;
- C. That the Court declare that the '580 patent and the '982 patent are not invalid;
- D. That the Court cancel the U.S. Trademark Registrations of Bedgear's PERFORMANCE Marks;
- E. That the Court declare non-infringement, no unfair competition, and no dilution of any and all of Bedgear's PERFORMANCE Marks, BASE Marks, and AIR Mark;
- F. That SHEEX be awarded reasonable attorneys' fees and costs of suit;
and
- G. That the Court award SHEEX such other and further relief as may be appropriate.

JURY DEMAND

SHEEX demands trial by jury on all issues so triable.

Dated: June 22, 2015

FISH & RICHARDSON P.C.

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